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In the Supreme Court of the United States

OCTOBER TERM, 1993

DEPARTMENT OF TAXATION AND FINANCE OF NEW YORK, ET AL., PETITIONERS

v.

MILHELM ATTEA & BROS., INC., ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether the New York regulatory scheme for collecting cigarette taxes due from non-Indian consumers through regulation of the sale of tax-exempt cigarettes by federally licensed Indian Trader wholesalers to Indian purchasers is preempted by federal law, including the Indian Trader Statutes, 25 U.S.C. 261 *et seq*.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Introduction and summary of argument	9
Argument:	
I. New York may require precollection of taxes on reservation sales of cigarettes by Indian retailers to non-Indians, and may impose minimal burdens on Indian Traders incident to the collection of that tax	14
A. New York may not tax on-reservation sales of cigarettes to tribal members	14
B. *Moe* and its progeny permit a State to tax cigarette sales by Indian retailers to non-members and to require precollection of the tax and incidental record-keeping	15
C. The Indian Trader Statutes do not pose an independent obstacle to the minimal precollection and record-keeping burdens sustained in *Moe* and *Colville*	19
D. The treaties between the United States and the New York Indian Tribes do not render inapplicable the rule of *Moe* that States may tax cigarette sales to non-Indians	21
II. The New York cigarette tax scheme is nevertheless invalid as applied to respondents because it directly regulates and substantially burdens the distribution and sale of cigarettes to Indians	24
Conclusion	31
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Bryan v. *Itasca County*, 426 U.S. 373 (1976) 18

Cases—Continued: Page

California v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) 15, 18
California State Board of Equalization v. *Chemehuevi Indian Tribe*, 474 U.S. 9 (1985) 9, 15
Central Machinery Co. v. *Arizona State Tax Comm'n*, 448 U.S. 160 (1980) 14, 15, 20, 25, 26
Cherokee Nation v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831) 25
Choctaw Nation v. *Oklahoma*, 397 U.S. 620 (1970) 23
Confederated Salish & Kootenai Tribes of Flathead Reservation v. *Moe*, 392 F. Supp. 1297 (D. Mont. 1975), aff'd, 425 U.S. 463 (1976) 16, 18, 27
Confederated Tribes of Colville Indian Reservation v. *Washington*, 446 F. Supp. 1339 (E.D. Wash. 1978), aff'd in part and rev'd in part, 447 U.S. 134 (1980) 19
County of Oneida v. *Oneida Indian Nation*, 470 U.S. 226 (1985) 18, 22, 23, 25
County of Yakima v. *Confederated Tribes & Bands of Yakima Indian Nation*, 112 S. Ct. 683 (1992) 14, 24
Hancock v. *Train*, 426 U.S. 167 (1976)..... 28
Herzog Bros. Trucking, Inc. v. *State Tax Comm'n*:
69 N.Y.2d 536 (1987), vacated and remanded, 487 U.S. 1212 (1988) 7
72 N.Y.2d 720 (1988) 7
Indian Country, U.S.A., Inc. v. *Oklahoma*, 829 F.2d 967 (10th Cir. 1987), cert. denied, 487 U.S. 1218 (1988) 15
McClanahan v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973) 14
Moe v. *Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976) 3, 9, 14, 15, 16, 18, 20, 21, 27
Montana v. *Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) 24
New York ex rel. Ray v. *Martin*, 326 U.S. 496 (1946) 23

Cases—Continued: Page

Oklahoma Tax Comm'n v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) 7, 8, 9, 12, 13, 15, 17, 18
People v. *Snyder*, 532 N.Y.S.2d 827 (Erie County Ct. 1988) 18
People of State of New York v. *Anderson*, 671 F. Supp. 220 (W.D.N.Y. 1987)..... 18
Rice v. *Rehner*, 463 U.S. 713 (1983) 18, 27
Shoshone Tribe of Indians v. *United States*, 299 U.S. 476 (1937) 23
Snyder v. *Wetzler*, 1993 WL 463277 (N.Y. App. Div. Nov. 10, 1993) 12, 22, 23-24
State Tax Comm'n v. *Herzog Bros. Trucking, Inc.*, 487 U.S. 1212 (1988) 7
The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867) 24
The New York Indians, 72 U.S. (5 Wall.) 761 (1867) 24
United States v. *Burns*, 725 F. Supp. 116 (N.D.N.Y. 1989) 18
United States v. *McBratney*, 104 U.S. 621 (1881) 23
United States v. *Parton*, 132 F.2d 886 (4th Cir. 1943) ... 19
Warren Trading Post Co. v. *Arizona Tax Comm'n*, 380 U.S. 685 (1965) 7, 8, 9, 14, 15, 20, 25, 26, 29
Washington v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) 3, 8-9, 15, 16, 17, 18, 20, 21, 30
White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 (1980) 15
Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) 25, 27

Constitution, treaties, statutes and regulations:

U.S. Const. Art. I, § 8, Cl. 3 (Indian Commerce Clause) .. 25, 30
Treaty of Buffalo Creek (1842), 7 Stat. 586 ..... 23, 24
Art. 9, 7 Stat. 590 23

Treaties, statutes and regulations—Continued: Page

Treaty of Fort Harmar (1789), 7 Stat. 33 22
Art. I, 7 Stat. 33 22
Treaty of Fort Stanwix (1784), 7 Stat. 15 ..... 22, 23
Art. III, 7 Stat. 15 22
Treaty of Peace of Canandaigua (1794), 7 Stat. 44 ..... 22, 23
Art. III, 7 Stat. 45 ..... 22, 23
Act of July 22, 1790, ch. 33, 1 Stat. 137 25
Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (Public Law 280) 18
25 U.S.C. 1321-1326 18
Buck Act, 4 U.S.C. 105 *et seq.* 15
4 U.S.C. 105(a) 15
Indian Trader Statutes, 25 U.S.C. 261 *et. seq.* 1, 2, 10, 1a
25 U.S.C. 261 ..... 2, 9, 11, 25, 26, 28, 1a
25 U.S.C. 262 ..... 26, 1a
25 U.S.C. 264 ..... 18, 26, 2a
18 U.S.C. 1161 ..... 18, 27
25 U.S.C. 232 18
25 U.S.C. 233 18
N.Y. Tax Law (McKinney 1987 & Supp. 1994):
§ 471.1 (McKinney Supp. 1994) 1
§ 471.2 (McKinney 1987) 2, 14
§ 474 (McKinney Supp. 1994) 2
§ 1814(h) (McKinney Supp. 1994) 2
§ 1846(a) (McKinney 1987) 2
Nev. Rev. Stat. Ann. (Michie 1986 & Supp. 1991):
§ 370.280 (Michie 1986) 13
§ 370.515 (Michie Supp. 1991) 13
Okla. Stat. Ann. tit 68 (West Supp. 1994):
§§ 346 *et seq.* 13
§§ 424 *et seq.* 13
Wis. Stat. Ann. (West 1989):
§ 139.323 13
§ 139.325 13

Regulations—Continued: Page

25 C.F.R. Pt. 140 ..... 2, 10, 25, 2a
Section 140.1 ..... 26, 2a
Section 140.3 ..... 26, 3a
Section 140.5 ..... 26, 3a
Section 140.9 ..... 26, 8a
Section 140.9(a) 26, 8a
Section 140.9(b) 27, 8a
Section 140.12 ..... 27, 9a
Section 140.14 ..... 26, 9a
Section 140.17 ..... 26, 10a
Section 140.18 ..... 26, 10a
Section 140.19 ..... 26, 11a
Section 140.21 ..... 26, 11a
Section 140.22 ..... 26, 11a
Section 140.23 ..... 26, 11a
Section 140.24 ..... 26, 12a
Section 140.25 ..... 26, 12a
Section 140.26 ..... 18, 26, 12a
N.Y. Comp. Codes R. & Regs. tit. 20 (20 NYCRR):
Section 335.6 3
Section 335.6(a) 3, 4
Section 335.6(b)(1) 3
Section 335.6(b)(1)(ii) 30
Section 335.6(b)(3) 3
Section 335.6(b)(4) 4
Section 335.6(b)(5) 3
Section 335.6(d)(1)(i) 4, 28
Section 335.6(d)(1)(iii) 4
Section 335.6(d)(3) 4
Section 335.6(e) 3
Section 335.6(f)(1) 27
Section 335.6(f)(1)(ii)(a) 4
Section 335.6(f)(1)(ii)(b) 4
Section 335.6(f)(1)(iii) 28
Section 335.6(f)(1)(iii)(a) 4
Section 335.6(f)(1)(iii)(b) 4
Section 335.6(f)(3) 4
Section 335.6(f)(3)(ii) 29

Regulations—Continued: Page

Section 335.6(g) 3
Section 335.6(g)(1) 4
Section 335.6(g)(3) 5
Section 335.6(g)(4) 4
Section 335.7 3
Section 335.7(b) 4
Section 335.7(c) 28
Section 335.7(c)(1) 5, 6, 29
Section 335.7(c)(2) 5
Section 335.7(d) 28
Section 335.7(d)(1) 5
Section 335.7(d)(2)(i) 5, 6
Section 335.7(d)(2)(ii) 6
Section 335.7(d)(3)(i) 6, 29
Section 335.7(d)(3)(ii) 6
Section 335.7(d)(4) 6, 29

Miscellaneous:

Felix S. Cohen's Handbook of Federal Indian Law (1982 ed.) 23
58 Fed. Reg. 56,504 (Oct. 25, 1993) 13
The Federalist No. 42 (J. Madison) (J. Cooke ed. 1961) ... 25
H.R. Rep. No. 474, 23d Cong., 1st Sess. (1834) 25

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INTEREST OF THE UNITED STATES

The United States has an interest in the development of sound principles governing state taxation in Indian matters that further the policies of federal treaties and statutes promoting tribal sovereignty and economic independence. The preemption claim in this case is based on the Indian Trader Statutes, 25 U.S.C. 261 *et seq.*, which are administered by the Department of the Interior.

STATEMENT

1. The State of New York imposes a tax in the amount of $0.56 per pack on all cigarettes purchased in the State, except where the State is without power to impose the tax. N.Y. Tax Law § 471.1 (McKinney Supp. 1994). "[T]he ultimate incidence of and liability for the tax shall be upon the

consumer," N.Y. Tax Law § 471.2 (McKinney 1987), but the tax is precollected at the beginning of the distribution stream when wholesalers purchase tax stamps from the State Tax Commission. A wholesaler must affix the stamps to the cigarette packs and collect the tax from its retailer-customers, who must, in turn, collect the tax from the ultimate consumers. *Ibid.* Unstamped cigarettes subject to tax may be forfeited (N.Y. Tax Law 1846(a) (McKinney 1987)), and criminal penalties attach to the "willful" possession of unstamped cigarettes without the written receipt required by New York Tax Law Section 474. See N.Y. Tax Law 1814(h) (McKinney Supp. 1994).

2. Respondents Milhelm Attea & Bros., Inc., and Elias Attea, Jr., are non-Indians who are wholesale distributors of cigarettes and tobacco products. In order to sell cigarettes to reservation Indian retailers, respondents obtained licenses from the Department of the Interior pursuant to the Indian Trader Statutes, 25 U.S.C. 261 *et seq.* Any retailers (whether Indian or non-Indian) who purchase cigarettes from respondents and resell them to Indians on the reservations are also covered by the Indian Trader Statutes.[1] Those Statutes confer on the Commissioner of Indian Affairs the "sole power and authority to appoint traders to the Indian tribes and to make * * * rules and regulations * * * specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. 261. Implementing regulations govern, *inter alia*, license applications and fees, the sale of tobacco products to minors, federal audits of traders to assure fair and reasonable prices, and extensions of credit. See 25 C.F.R. Pt. 140; pages 25-26, *infra*.

3. Because the legal incidence of and liability for New York's cigarette tax falls on the ultimate consumer, sales

[1] It is our understanding that all or virtually all retailers on the New York reservations are Indians. We have been informed by the Department of the Interior that of the approximately 125 federally licensed Indian Traders in New York, 61 are Indians, all of whom are retailers, and 64 are non-Indians, all of whom are wholesalers.

by reservation retailers to tribal members are exempt from that tax under *Moe* v. *Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 475-481 (1976). By contrast, sales by reservation retailers to non-members are not exempt from state taxation. *Id.* at 481-483; *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 160-161 (1980).

In 1988, New York's Commissioner of Taxation and Finance adopted regulations in an effort to prevent the sale of untaxed (unstamped) cigarettes to non-Indians at retail outlets on Indian reservations in the State. Pet. App. A5. Under those regulations, purchases of untaxed cigarettes may be made only by reservation retailers, Indian Tribes, or individual Indians who meet certain eligibility criteria and comply with state requirements governing the allocation of tax-exempt cigarettes among retail outlets on each reservation. 20 NYCRR 335.6.[2]

a. An individual Indian may purchase untaxed cigarettes only for his or her own use or consumption within the reservation. 20 NYCRR 335.6(a) and (b)(1).[3] The Indian must provide the retailer with a certificate of exemption at the time of his or her first purchase and must sign an invoice for each subsequent purchase, identifying the quantity and price. § 335.6(e) and (g).

A retailer may purchase or sell untaxed cigarettes only if it is registered with the New York Department of Taxation and Finance (Department), uses or intends to use

[2] The regulations originally were numbered as Sections 335.6 and 335.7, and are reproduced as such at Pet. App. A62-A74. They were renumbered in December 1990 as Sections 336.6 and 336.7, without substantive change. To avoid confusion, we, like the parties, use the numbering in effect at the time this suit was commenced.

[3] Although *Colville* held that a State may tax cigarette sales to Indians who are not members of the Tribe having jurisdiction over the reservation where the sales take place, 447 U.S. at 160-161, the New York cigarette tax regulations appear to exempt from taxation sales to Indians who are members of any of the New York Tribes who purchase cigarettes on any of the reservations in the State. See 20 NYCRR 335.6(b)(1), (3) and (5).

the cigarettes to make qualified sales to Indians, and takes delivery of the cigarettes on the reservation. 20 NYCRR 335.6(a), (b)(4) and (f)(3). In order to obtain a registration certificate, the retailer must demonstrate that it "has no outstanding liability for any taxes or other amounts imposed pursuant to the Tax Law" (§ 335.6(f)(1)(ii)(a)); "is properly licensed or registered for any applicable taxes," such as the state sales tax (§ 335.6(f)(1)(ii)(b)); "has complied (or will comply) with any applicable tribal regulations and/or licensing procedures" (§ 335.6(f)(1)(iii)(a)); and "has no outstanding liability for any applicable taxes or other sums which may be imposed by an Indian nation or tribe, and which has finally been determined to be due from such applicant" (§ 335.6(f)(1)(iii)(b)). The retailer must furnish an exemption certificate upon its first purchase from a wholesaler and must sign an invoice for each subsequent purchase. § 335.6(g)(1).

An Indian Tribe may purchase unstamped cigarettes only for "its own official use or consumption within such reservation, or to make qualified sales [to tax-exempt purchasers]." 20 NYCRR 335.6(d)(1)(iii). The Tribe must hold a valid exempt organization certificate issued by the Department, § 335.6(d)(1)(i), and must furnish an exemption certificate and sign invoices when it purchases tax-exempt cigarettes. § 335.6(g)(1). The Department may cancel or suspend the Tribe's authority to make such purchases it it fails to comply with the cigarette tax law or regulations. § 335.6(d)(3).

The regulations also place various requirements on wholesalers that sell to reservation retailers and Indian Tribes. The wholesaler must be an agent licensed by the Department to purchase and affix cigarette stamps. 20 NYCRR 335.7(b). The wholesaler must obtain a copy of the exemption certificate of the retailer or the Tribe before selling or delivering any untaxed cigarettes, § 335.6(g)(1), and must include in its monthly cigarette tax return a report of all such sales to Tribes, retailers, and qualified Indian consumers. § 335.6(g)(4). Finally, wholesalers (as well as retailers) of untaxed cigarettes must establish an acceptable recording-keeping system to associate invoices for individual sales with the exemption certificates initially furnished by purchasers. § 335.6(g)(3).

b. The Department of Taxation and Finance also prescribes the amount of tax-exempt cigarettes that may be sold to an Indian Tribe and the retailers on each reservation. If a Tribe "agrees with the Department to regulate, license, or control the sale and distribution" within its reservation of "an agreed upon amount of [untaxed] cigarettes," the wholesaler must obtain the Tribe's approval prior to each sale and delivery of untaxed cigarettes on the reservation. 20 NYCRR 335.7(c)(1). We understand that none of the New York Tribes has entered into such an agreement with the Department.

In the absence of such an agreement, the wholesaler must obtain the approval of the Department prior to each sale and delivery. 20 NYCRR 335.7(c)(2). Approval "will be based upon evidence of valid purchase orders received by the [wholesaler]" for quantities of cigarettes that the Department finds to be "reasonably related" to the "probable demand" of the qualified Indian consumers in the "trade territory" of the registered retailer (or of the Tribe, if it chooses to make qualified retail sales). § 335.7(d)(1). The Department intends to implement these allocation provisions by issuing coupons to registered retailers entitling them to purchase a predetermined quantity of tax-exempt cigarettes. At the time of delivery, the retailer would submit the coupon to the wholesaler, which would then transmit a copy to the Department. Pet. Br. 12-13.

In determining "probable demand," the Department will consult with the Tribe concerned, but only if the Tribe "regulates, licenses or controls the sale and distribution of cigarettes within its reservation." 20 NYCRR 335.7(d)

(2)(i).[4] In the consultation process, the Tribe may submit evidence of previous sales to qualified Indian consumers, average consumption by Indian consumers on and near the reservation, or tribal enrollment. *Ibid.* If the Tribe does not regulate (or submit evidence), the Department will calculate probable demand based upon the average per capita consumption of cigarettes in New York, multiplied by the number of enrolled members of the affected Tribe (or, if membership data are not available, the population in the reservation service area, as determined by the Bureau of Indian Affairs). § 335.7(d)(2)(ii).

The regulations take a similar approach with respect to the Department's determination of a retail outlet's "trade territory." If the Tribe regulates the sale and distribution of cigarettes, the Department will consult with the Tribe. 20 NYCRR 335.7(d)(3)(i). If the Tribe does not regulate (or submit evidence), the Department will "calculate such trade territory based upon the information at its disposal." § 335.7(d)(3)(ii). The Department will also "take into consideration" any evidence submitted by a registered reservation retailer. § 335.7(d)(4).

4. a. Respondents filed this action in state court to enjoin petitioners from applying the New York cigarette tax regulations to their businesses. Respondents alleged that the cigarette tax scheme was preempted by the Indian Trader Statutes because it imposed limitations and burdens on their sales to Indians who are reservation retailers. The Supreme Court for Albany County granted

[4] The St. Regis Mohawk Tribe of the St. Regis Reservation has adopted a tobacco ordinance that specifically governs the sale of cigarettes. In addition, we have been informed by the Department of the Interior that the Tonowanda Band of Seneca Indians and the Tuscarora Indian Nation have unwritten policies concerning the sale of cigarettes. Although these three Tribes have chosen to regulate in the exercise of their inherent sovereign authority, they have not entered into agreements with the Department of Taxation and Finance to do so under 20 NYCRR 335.7(c)(1).

summary judgment in favor of respondents and entered injunctive relief. Pet. App. A28-A32, A33-A43.

The Appellate Division affirmed. Pet. App. A19-A24, A25-A27. Although it believed that the burden the tax scheme imposed on respondents was "only minimal," *id.* at A24, it concluded that, under precedent of the New York Court of Appeals interpreting this Court's decision in *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685 (1965), the Indian Trader Statutes leave "no room" for state tax schemes that impose additional burdens on Indian Traders. *Id.* at A22 (quoting *Herzog Bros. Trucking, Inc.* v. *State Tax Comm'n*, 69 N.Y.2d 536, 546 (1987), vacated and remanded, 487 U.S. 1212 (1988)).[5]

After the New York Court of Appeals denied review, 78 N.Y.2d 858 (1991), petitioners sought review in this Court. The Court granted the petition, vacated the judgment of the Appellate Division, and remanded for further consideration in light of *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991). See 112 S. Ct. 926 (1992) (Pet. App. A17-A18).

b. On remand, the Appellate Division sustained the tax scheme. Pet. App. A13-A16. It first quoted (*id.* at A15) this Court's observation in *Potawatomi* that "States may

[5] *Herzog* involved the Department's motor fuel tax regulations, which were the model for the cigarette tax regulations at issue in this case. While the State's certiorari petition in *Herzog* was pending in this Court, the Department proposed modifications to its motor fuel regulations to address some of the preemption problems. This Court granted the State's certiorari petition, vacated the judgment of the New York Court of Appeals, and remanded "for further consideration in light of proposed regulations formally published for comment by the Commissioner of Taxation and Finance of the State of New York on March 8, 1988." 487 U.S. 1212 (1988). On remand, the Court of Appeals adhered to its prior ruling regarding the earlier version of the regulations. It did not address the new version, because it determined that Herzog Brothers did not intend to continue sales to Indians, and that any ruling on the proposed regulations would therefore constitute an advisory opinion. *Herzog Bros. Trucking, Inc.* v. *State Tax Comm'n*, 72 N.Y.2d 720, 725 (1988). The court also noted that the State and the Indian Tribes were negotiating to resolve the matter. *Ibid.*

of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation * * * or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores." 498 U.S. at 514. Then, without discussing specific provisions of the tax scheme or the burdens it imposed, the court found the burdens minimal and therefore not preempted. Pet. App. A16.

c. The New York Court of Appeals reversed. Pet. App. A3-A12. It concluded that, notwithstanding the intervening decision in *Potawatomi*, this case continued to be controlled by the holding in *Herzog* that the Indian Trader Statutes leave no room for States to impose any burdens on Indian Trader wholesalers. In the Court of Appeals' view, the language in *Potawatomi* on which the Appellate Division relied merely suggested possible remedies when a State is seeking to collect taxes due on past sales, and did not authorize the State to require precollection of taxes that non-Indian consumers would pay on future sales. Pet. App. A10-A11.

The Court of Appeals further held that "[t]o the extent that the Supreme Court's decisions in *Moe*, *Colville* and *Potawatomi* may be read as validating the imposition of minimal burdens on Indian retailers and Indian traders, we conclude that the tax regulations at issue here impose *significant* burdens on the wholesaler." Pet. App. A11. The court noted that the regulations "dictate to Indian traders the number of unstamped cigarettes they can sell to reservation Indians and direct with whom they may trade," and it believed that because a wholesaler must prepay taxes on all cigarettes delivered to a reservation in excess of the state-determined amount, the tax scheme "imposes a sales tax on Indian retailers." *Ibid.* For these reasons, the court concluded (*id.* at A11-A12) that the scheme attempts to regulate an area "which Congress has taken 'fully in hand'" (quoting *Warren Trading Post*, 380 U.S. at 690); undermines the purpose of the Indian Trader Statutes to "comprehensively * * * regulate businesses selling goods to reservation Indians" (quoting *Colville*, 447 U.S. at 155); interferes with the authority of the Department of the Interior to determine "the kind and quantity of goods and the prices at which such goods shall be sold to the Indians" (quoting 25 U.S.C. 261); and imposes financial burdens on respondents and the Indians with whom they deal, thereby creating the potential to "disturb and disarrange" the plan of the Indian Trader Statutes to protect Indians from unfair prices (quoting *Warren Trading Post*, 380 U.S. at 691). The court concluded: "Manifestly, the tax regulations before us regulate trade with Indians to a significant degree. As such, they are barred by Federal preemption and cannot be applied to cigarette wholesale dealers involved in trading with Indians on reservations located in New York State." Pet. App. A12.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. This case is governed by straightforward propositions established by the Court's prior decisions. First, under general principles barring state taxation of reservation Indians—as well as this Court's decisions specifically concerning cigarette taxes—New York may not tax sales of cigarettes by reservation retailers to tribal members. See *Moe* v. *Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976); *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *California State Board of Equalization* v. *Chemehuevi Indian Tribe*, 474 U.S. 9 (1985) (per curiam); *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991). Second, under *Moe* and its progeny, the State does, by contrast, have the authority to tax sales made to non-members of the Tribe.

Third, and again under *Moe* and its progeny, a State's cigarette tax scheme may impose certain minimal burdens on a reservation Indian retailer: (1) to collect the cigarette tax from its non-member customers and remit the tax to the State, and (2) to keep records of its tax-exempt sales to tribal members. It follows *a fortiori* that a State may

impose comparable burdens on non-Indian wholesalers residing off the reservation: (1) to collect from reservation retailers the state tax due on cigarettes the retailers will sell to non-members, and (2) to maintain records of their tax-exempt sales to retailers.

Fourth, *Moe* and *Colville* establish that the State may provide for precollection of its tax, either by requiring the wholesaler to purchase stamps from the State and then collect the tax from the Indian retailers (who will in turn collect the tax from their non-member customers), or by requiring the Indian retailer to purchase stamps directly from the State and affix them to cigarette packs before they are sold to non-members. The Indian Trader Statutes, 25 U.S.C. 261 *et seq.*, and the regulations implementing those Statutes, 25 C.F.R. Pt. 140, do not pose an independent barrier to such a precollection scheme—at least in the absence of a showing (lacking here) that it imposes an undue burden on Indian retailers or on commerce with the Indians. The effect is simply to pass through the chain of distribution a valid cost associated with the sale of a particular product handled by an Indian retailer that deals with non-Indians.

For the foregoing reasons, we disagree with the initial holding of the New York Court of Appeals: that the cigarette tax regulations are preempted because the Indian Trader Statutes leave no room for state regulation and bar even the "minimal burdens" of precollection and record-keeping on respondents' commerce with reservation Indian retailers. See Pet. App. A7-A11. If those were the only measures New York had adopted, reversal of the judgment below would be warranted.

II. New York, however, has done much more. Through a complex system of registration, quotas, coupons, and state-designated "trade territories" on Indian reservations, the Department of Taxation and Finance has instituted a program of direct state regulation of the distribution of cigarettes by Indian Trader wholesalers to Indian Tribes and reservation Indian retailers. That

regulatory scheme conflicts with the Indian Trader Statutes, which assign to the Department of the Interior the "sole power and authority to appoint traders to the Indian tribes and to make * * * rules and regulations * * * specifying the kind and quantity of goods * * * [to] be sold to the Indians." 25 U.S.C. 261.

In addition, the requirement that Indian retailers obtain a registration certificate from the State in order to make tax-exempt sales of cigarettes to Indian consumers transgresses established limitations, derived from Indian treaties and statutes and the backdrop of Indian sovereignty, on the regulatory authority of the States. Other aspects of the State's regulatory scheme—the requirement that Indian Tribes hold a valid exemption certificate from the State, the subordination of the Tribe's regulatory power if it does not enter into an agreement with the New York Department of Taxation and Finance, and the requirement that Indian retailers comply with tribal cigarette tax laws as a condition to obtaining permission from the State to sell cigarettes free of state taxation—are preempted for the additional reason that they directly interfere with tribal sovereignty.

We therefore agree with the alternative holding by the New York Court of Appeals: that the cigarette tax regulations are preempted as applied to respondents' sales to Indian retailers because the regulations "impose *significant* burdens" and "regulate trade with Indians to a significant degree." Pet. App. A11-A12. The judgment of the Court of Appeals therefore should be affirmed.

* * * * *

New York defends its regulatory scheme on the ground that it was designed to prevent the loss of revenue resulting from widespread sales of cigarettes to non-Indians on reservations in the State without payment of taxes. See Pet. Br. 10-11 & n.4. That loss of revenue, however, appears to be attributable in large measure to the combination of two mistaken legal positions: the position of

some New York Tribes and many Indian retailers that the New York Tribes' treaties with the United States exempt them from the rule of *Moe* that the State may collect (and precollect) taxes on reservation sales to non-Indians (see Seneca Nation *et al.* Amici Br. Pet. Stage; *Snyder* v. *Wetzler*, 1993 WL 463277, at *1-*3 (N.Y. App. Div. Nov. 10, 1993)), and the position of respondents and other wholesalers and retailers that the Indian Trader Statutes absolutely bar the State from imposing any duty of precollection on wholesalers that sell cigarettes to reservation Indian retailers (see *id.* at *3-*4). If, as we urge, those propositions are rejected—and if the State should in the future impose only precollection and r ord-keeping requirements of the sort sustained in *Moe* and *Colville*, without the market allocation features of the regulations challenged here—the retailers, wholesalers, and Tribes should be given a reasonable opportunity to conform their operations to those new regulations.[6]

Once the governing rules are clear, there is reason to anticipate that the Tribes and the State would enter into compacts or otherwise reach agreement on the logistics of tax collection and remittance. Such arrangements have been worked out in other States.[7] For example, after this

[6] If the wholesalers, retailers, and Tribes do not conform their conduct, other measures may be available. The State could seize unstamped cigarettes off the reservation or assess wholesalers who supplied unstamped cigarettes to reservation retailers for sale to non-Indians. *Potawatomi*, 498 U.S. at 514.

[7] Some compacts provide for state collection of taxes (including tribal taxes) and remittance by the State to the Tribe of a mutually agreed upon fixed percentage of revenues in lieu of the exact amount imposed by tribal taxes. *E.g.*, Tax Collection Agreement Between the Standing Rock Sioux Tribe and the Department of Revenue of the State of South Dakota (Feb. 25, 1991). Other compacts provide for the Tribes to apply for refunds from the State of the taxes precollected on cigarettes sold to Indians, as well as the refund of an agreed-upon portion of the taxes on cigarettes sold to non-Indians. *E.g.*, Agreement Between the Shakopee Mdewakanton Indian Community of the Minnesota Sioux and the Minnesota Department of Revenue Relating to the Refund of Precollected Excise Taxes on Cigarettes (Aug. 25, 1988); Agreement Between the Stockbridge-Munsee Community and the Wisconsin Department of Revenue Relating to the Refund of Precollected Excise Taxes on Cigarettes (Aug. 25, 1988). A third type of compact provides for tribal payment of an agreed upon percentage (*e.g.*, 25%) of state taxes on all tribal cigarette purchases without reference to the tribal membership or non-membership status of the purchasing public. *E.g.*, Tribal/State Tobacco Tax Compact Between the Cherokee Nation and the State of Oklahoma (June 8, 1992); Potawatomi/Oklahoma Tobacco Tax Compact (Jan. 4, 1993). Several States have enacted legislation specifically authorizing such compacts and/or providing for similar alternative tax collection schemes. See, *e.g.*, Nev. Rev. Stat. Ann. §§ 370.280 (Michie 1986), 370.515 (Michie Supp. 1991); Okla. Stat. Ann. tit. 68, §§ 346 *et seq.*, 424 *et seq.* (West Supp. 1994); Wis. Stat. Ann. §§ 139.323, 139.325 (West 1989).

Court made clear in *Potawatomi* that the principles of *Moe* apply in Oklahoma—and pointed out that States have alternatives to suits against Tribes to enforce their tax codes, such as "enter[ing] into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax," 498 U.S. at 514—the Citizen Band Potawatomi Tribe entered into a compact with Oklahoma. See note 7, *supra*. In addition, the Department of the Interior could adopt regulations under the Indian Trader Statutes to facilitate resolution of tax and other issues arising between Indian Traders and the State.[8] "And if [New York] and other States similarly situated find that none of these alternatives produce the revenues to which they are entitled, they may of course seek appropriate legislation from Congress." *Potawatomi*, 498 U.S. at 514.

[8] The Department of the Interior is considering the adoption of regulations addressing Indian Trader issues in New York by, *e.g.*, providing a role for the Tribes under the Indian Trader regulations in regulating retail business, including the sale of cigarettes. See 58 Fed. Reg. 56,504 (Oct. 25, 1993).

ARGUMENT

I. NEW YORK MAY REQUIRE PRECOLLECTION OF TAXES ON RESERVATION SALES OF CIGARETTES BY INDIAN RETAILERS TO NON-INDIANS, AND MAY IMPOSE MINIMAL BURDENS ON INDIAN TRADERS INCIDENT TO THE COLLECTION OF THAT TAX

A. New York May Not Tax On-Reservation Sales Of Cigarettes To Tribal Members

It is undisputed in this case that New York may not impose its cigarette tax on sales to tribal members on their reservation. " '[A]bsent cession of jurisdiction or other federal statutes permitting it,' * * * a State is without power to tax reservation[] lands and reservation[] Indians." *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 112 S. Ct. 683, 688 (1992) (citation omitted). Because "the ultimate incidence of and liability for" the New York cigarette tax "shall be on the consumer" (N.Y. Tax Law §471.2 (McKinney 1987)), *Moe* establishes that the tax may not be imposed when the consumer is a tribal member. 425 U.S. at 480-481. In reaching that result in *Moe*, the Court relied on *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973), which applied general principles barring state taxation of Indians to invalidate a state tax imposed on reservation income earned by an individual Indian. See 425 U.S. at 475-477, 480-481. But the cigarette tax in *Moe* presumably was also invalid under the Indian Trader Statutes, because it had the effect of increasing the price the Indian retail customers paid to purchase goods from an Indian Trader. See *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 691 (1965); *Central Machinery Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160, 164 n.3, 165-166 (1980).

B. *Moe* And Its Progeny Permit A State To Tax Cigarette Sales By Indian Retailers To Non-Members And To Require Precollection Of The Tax And Incidental Record-Keeping

Although on-reservation sales to tribal members are immune from state taxation, this Court has held on four separate occasions that a State does have authority to impose its cigarette tax on sales to non-members if state law places the incidence of the tax on the ultimate consumer. *Moe*, 425 U.S. at 481-483; *Colville*, 447 U.S. at 142 n.9, 150-151, 159; *Chemehuevi*, 474 U.S. at 11-12; *Potawatomi*, 498 U.S. at 512.[9] The Court in those cases also sustained a requirement that Indian retailers collect the tax from their non-Indian customers by adding the tax to the sales price. *Moe* described that mechanism as a "simple expedient" and a "minimal burden designed to avoid the likelihood that in its absence non-Indians pur-

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[9] A State's authority to tax non-Indian purchases from Indians on a reservation is not, however, unlimited. The basis for state taxation is strongest when Indians "impor[t] a product onto the reservations for immediate resale to non-Indians," and thus are marketing a state tax exemption. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987); see *Colville*, 447 U.S. at 155. But when Indians sell items or services that have value generated on the reservation by activities in which Indians have a significant interest, state taxation is preempted. *Cabazon*, 480 U.S. at 219-222; *Indian Country, U.S.A., Inc.* v. *Oklahoma*, 829 F.2d 967, 983-987 (10th Cir. 1987), cert. denied, 487 U.S. 1218 (1988). Even in general retail establishments that stock products imported for resale, different considerations may be present if the businesses do not merely cater to off-reservation non-Indians. Compare *Colville*, 447 U.S. at 155; but see *id.* at 150 n.25; cf. *Warren Trading Post*, 380 U.S. at 691 n.18 (Buck Act, 4 U.S.C. 105 *et seq.*, which authorizes state sales and use taxes "within a Federal area," 4 U.S.C. 105(a), is inapplicable to Indian reservations); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 151 n.16 (1980) (same). There is no reason to consider those issues in this case, however, because the respondent wholesalers have not argued that they are exempt from precollecting the state cigarette tax on the basis of any such special characteristics of the Indian retailers to whom they sell.

chasing from the tribal seller will avoid payment of a concededly lawful tax." 425 U.S. at 482, 483.

Finally, both *Moe* and *Colville* sustained the application to Indian retailers of a provision for *precollection* of the tax prior to the retailers' sales to non-Indians. The state law in *Moe* required the retailer to prepay the tax to the wholesaler at the time of purchase, and the district court upheld that requirement. *Confederated Salish & Kootenai Tribes of Flathead Reservation* v. *Moe*, 392 F. Supp. 1297, 1308, 1311 (D. Mont. 1975) (three-judge court); see also 74-1656 J.S. App. 91 (district court judgment). The Tribes challenged the precollection requirement on appeal to this Court (74-1656 Brief for Appellees/Cross-Appellants 22-25) but the Court affirmed the judgment below, see 425 U.S. at 483, specifically noting that the district court had held that Montana "may require a precollection of the tax imposed by law upon the non-Indian purchaser of the cigarettes," *id.* at 468.[10]

Similarly, in *Colville*, the Court held that "the State may validly require the tribal smokeshops to affix tax stamps purchased from the State to individual packages of cigarettes prior to the time of sale to nonmembers of the Tribe," because that procedure was legally indistinguishable from the collection burden permitted in *Moe*. 447 U.S. at 159. Thus, a precollection requirement is permissible whether state law requires the retailer to prepay the tax directly to the State (as in *Colville*) or to a wholesaler that has already prepaid the tax to the State (as in *Moe* and this case). *Colville* also upheld state requirements that Indian retailers keep records of their taxable and tax-exempt sales, because the retailers had failed to show that the

[10] The Court noted the district court's recognition that because the "statutory scheme contemplates advance payment or 'precollection' of the sales tax by the retailer," its holding (distinguishing between sales to Indians and sales to non-Indians) would result in "complicated problems" of enforcement by the State. The district court deferred passing on those problems pending a decision by this Court, and the Court accordingly expressed no opinion on them. 425 U.S. at 468 n.6.

requirements were not reasonably necessary to prevent fraudulent transactions. *Id.* at 159-160.

Moe and *Colville* therefore establish that burdens devolving on Indian retailers by operation of state tax law are not preempted if the measures are incidental to the State's valid and non-discriminatory exercise of taxing authority over non-Indians and impose only minimal burdens on the retailer.[11] *A fortiori*, *Moe* and *Colville* do not prohibit New York from imposing comparable burdens on non-Indian wholesalers—*e.g.*, by requiring them to prepay the tax through the purchase of tax stamps from the State, collect the tax from Indian retailers, and keep records of their sales of unstamped cigarettes to Indian retailers.

Indeed, as the Appellate Division pointed out (Pet. App. A15), this Court stated in *Potawatomi* that "States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, *Colville*, *supra*, at 161-162, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, *City Vending of Muskogee, Inc.* v. *Oklahoma Tax Comm'n*, 898 F.2d 122 (CA 10 1990)." 498 U.S. at 514. The New York Court of Appeals found that language inapposite here. It believed that the Court was approving only methods by which the State could collect taxes that were already due on *past* sales to non-Indians, not methods for the precollection of taxes that would be due on *future* sales. See Pet. App. A11-A12. The necessary premise of the State's authority to assess the wholesaler, however, must be that the wholesaler, solely by virtue of its sale of unstamped cigarettes to Indian retailers, assumed a duty and liability with respect to the subsequent resale of the cigarettes by the retailers to their non-Indian customers.

[11] No retailer or Tribe is a party to this case, and there has been no determination whether the record-keeping required of retailers and Tribes under the New York scheme is either unduly burdensome or not reasonably necessary to prevent fraudulent transactions. See *Colville*, 447 U.S. at 159-160.

If the State may impose and enforce a duty on the wholesaler to pay the taxes due on cigarette sales to non-Indians after the fact, there is no reason why the State should be barred from imposing and enforcing such a duty on the wholesaler at the time it sells the cigarettes to the retailer. [12]

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[12] This case presents no question of how a State might enforce its regulations against Indian retailers or Tribes on reservations, because no Indian retailers or Tribes are parties. New York has acquired civil and criminal jurisdiction over the reservations in that State pursuant to special statutes (25 U.S.C. 232, 233) that were predecessors to Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, codified at 25 U.S.C. 1321-1326). See *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 241 (1985) (*Oneida II*). This Court has held, however, that a State that has assumed full civil and criminal jurisdiction pursuant to Public Law 280 does not thereby obtain authority to enforce its tax or general regulatory laws against Indians. See *Bryan* v. *Itasca County*, 426 U.S. 373 (1976); *Cabazon*, 480 U.S. at 209-212. The special jurisdictional statutes applicable to New York have been interpreted in the same manner. See *United States* v. *Burns*, 725 F. Supp. 116, 125 (N.D.N.Y. 1989); *People of State of New York* v. *Anderson*, 671 F. Supp. 220, 224 (W.D.N.Y. 1987); *People* v. *Snyder*, 532 N.Y.S.2d 827, 830-831 (Erie County Ct. 1988); Seneca Nation *et al.* Amici Br. Pet. Stage 18.

In *Moe*, Montana had purported to acquire criminal jurisdiction over the Flathead Reservation. See 392 F. Supp. at 1306. But although the Tribes' filing of *Moe* in the district court was precipitated by the state sheriff's arrest of a tribal member for selling unstamped cigarettes (see 425 U.S. at 467), the Court did not address whether the State could enforce its tax laws directly against tribal members (see *id.* at 481-483), perhaps because *Moe* was decided prior to *Itasca County*. In *Colville*, the Court specifically declined to decide whether state officials could enter the reservation and seize cigarettes held by Indian retailers. 447 U.S. at 162. The Court likewise did not resolve any enforcement issues in *Potawatomi* (where the State had no jurisdiction pursuant to Public Law 280), although the Court reiterated the rule of *Itasca County* and *Cabazon* that Public Law 280 is not "independently sufficient to confer authority on a State to extend the full range of its regulatory authority, including taxation, over Indians and Indian reservations." 498 U.S. at 513. The Court did observe, however, that it had never held that individual tribal officers and agents are not liable for damages in actions brought by the State. *Id.* at 514.

The Indian Trader Statutes may also suggest limits on the remedies available to a State against Indian retailers. Although 25 U.S.C. 264

C. The Indian Trader Statutes Do Not Pose An Independent Obstacle To The Minimal Pre-Collection And Record-Keeping Burdens Sustained In *Moe* And *Colville*

The New York Court of Appeals recognized that *Moe* and *Colville* had sustained the imposition of state-law precollection and record-keeping burdens on Indian retailers. It nevertheless rejected the State's contention that it may impose comparable burdens on wholesalers "who are just one step further back [i]n the distribution chain." Pet. App. A8. The Court of Appeals found a "significant difference" in the fact that *Moe* and *Colville* involved minimal burdens imposed on Indian retailers dealing with non-Indians, while respondents present the reverse situation of non-Indians who deal with Indians. In the court's view, the Indian Trader Statutes bar imposition of even "minimal burdens" on the relationship between a non-Indian wholesaler and its Indian retailer-customers. Pet. App. A7-A8, A10-A11. That view cannot be squared with *Colville*.

In *Colville*, the on-reservation Indian retailers were licensed Indian Traders, and the district court held that, under *Warren Trading Post*, the Indian Trader Statutes barred the State from imposing record-keeping obligations on those Traders in connection with their tax-exempt sales to Indians. *Confederated Tribes of Colville Indian Reservation* v. *Washington*, 446 F. Supp. 1339, 1347, 1359 (E.D. Wash. 1978) (three-judge court). The State challenged that holding in this Court, defending the duty to keep records of tax-exempt sales to Indians as a "minimal burden" and a necessary adjunct to the State's authority to require Indian retailers to collect and remit taxes on sales to non-Indians (and to prevent evasion of the tax by

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authorizes seizure of merchandise from and assessment of fines against non-Indians who violate the Indian Trader license requirement, only injunctive relief is available against Indians. *United States* v. *Parton*, 132 F.2d 886 (4th Cir. 1943) (per curiam).

non-Indians). See 78-630 Brief for Appellants 101-102; see also 78-630 Brief for Appellees 118-119 (defending district court's ruling). This Court reversed, reiterating the holding of *Moe* that "the State may impose at least minimal burdens on Indian businesses to aid in collecting and enforcing th[e] tax," and concluding that the Tribes had failed to demonstrate that the record-keeping requirements for exempt sales "are not reasonably necessary as a means of preventing fraudulent transactions." 447 U.S. at 159, 160. The Court did not discuss the Indian Trader Statutes. But its reversal of the district court's holding that rested on the Indian Trader Statutes (against the background of the parties' arguments addressed to those Statutes) should, in our view, be understood as a holding that the Indian Trader Statutes do not bar the imposition of all "minimal burdens" in connection with Indian Traders' sales to Indians.

Moreover, as explained above (see page 16, *supra*), *Moe* sustained a provision that Indian retailers were required to prepay the tax to the wholesaler. That holding necessarily assumed that the Indian Trader wholesaler would have a duty to collect the tax from the Indian retailers and remit it to the State. Indeed, under the scheme in *Moe*, the wholesaler would *already* have prepaid the tax to the State by the time it sold the cigarettes to the Indian retailers and collected the tax from them. Although the Court did not specifically address the question whether the Indian Trader Statutes bar imposition of such a burden on the non-Indian wholesaler, the clear implication is that they do not. As the Court recognized in *Moe* itself, 425 U.S. at 482, the purpose of the Indian Trader Statutes is to protect Indian purchasers; the protections afforded the Indian Trader are derivative of that purpose. *Central Machinery*, 448 U.S. at 163; *Warren Trading Post*, 380 U.S. at 691. If, as the Court held in *Moe*, the State may impose a prepayment duty on the Indian retailer in connection with the distribution of cigarettes destined for non-Indian consumers, then the

Indian Trader Statutes should not be construed to afford the non-Indian wholesaler an independent immunity from the same duty.[13]

The state cigarette tax is one lawful component of the total price paid by a non-Indian who purchases cigarettes from an Indian retailer. The prepayment and collection duties imposed on Indian retailers and their non-Indian wholesalers are simply the mechanism for passing that component through the chain of distribution—in the same manner as other components of the price to the ultimate consumer (*e.g.*, costs incurred by the manufacturer, wholesaler, and retailer) are passed along. The existence of an Indian retailer in the chain of distribution from a non-Indian wholesaler to a non-Indian consumer does not stand as a barrier to that pass-through. Just as Indian retailers may not market to non-Indians an exemption from state taxation, *Colville*, 447 U.S. at 155, non-Indian wholesalers may not market such an exemption through Indian retailers.

D. The Treaties Between The United States And The New York Indian Tribes Do Not Render Inapplicable The Rule Of *Moe* That States May Tax Cigarette Sales To Non-Indians

Respondents have not disputed that the general principles of *Moe*—which permit a State to tax cigarette sales by Indian retailers to non-Indians and to require precollection of the tax—apply in New York State. Several New York Indian Tribes, however, have filed a

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[13] The Court in *Moe* did specifically reject the contention that, because the retailer was itself an Indian Trader in its sales to Indian customers, the Indian Trader Statutes and *Warren Trading Post* barred the State from imposing the collection burden on the Indian retailer. The Court reasoned that the tax challenged in *Warren Trading Post* was imposed directly on the Indian Trader and was based on its sales to Indians, while in *Moe* the incidence of the tax was on the non-Indian purchasers and was measured by the volume of the retailer's sales to such purchasers. 425 U.S. at 482.

brief as amici curiae contending that the treaties between the United States and the New York Tribes distinguish them for present purposes from Tribes elsewhere in the United States and render the principles of *Moe* inapplicable on their reservations. See Seneca Nation *et al.* Amici Br. Pet. Stage 4-9, 14-17. The Tribes made the same argument in the New York Court of Appeals. That court did not specifically address the Tribes' argument, although its opinion appears to assume that *Moe* permits New York to tax sales to non-Indians and to require Indian retailers to collect the taxes. See Pet. App. A8-A9, A10. Moreover, the Appellate Division recently rejected the same treaty-based argument in a challenge by an Indian retailer to the application of the New York cigarette tax to his sales to non-Indians. See *Snyder* v. *Wetzler*, 1993 WL 463277, at *1-*3. We agree with that ruling.

The Tribes first rely (Br. Pet. Stage 7-8) on language in three early treaties with the Six Nations. They point out that Article III of the Treaty of Fort Stanwix (1784), 7 Stat. 15, provided that the Nations "shall be secured in the peaceful possession of the lands they inhabit"; that Article I of the Treaty of Fort Harmar (1789), 7 Stat. 33, provided that the lines fixed by the Treaty would remain the boundary between the six Nations and the United States "forever" and that the United States relinquished its claim to those lands; and that Article III of the Treaty of Peace of Canandaigua (1794), 7 Stat. 45, provided that the United States would never disturb the Senecas in the "free use and enjoyment" of their lands. See *Oneida II*, 470 U.S. at 231. Those passages do not address the subject of state taxing and other jurisdiction over non-Indians within the territories of the Six Nations. Nor, contrary to amici's suggestion (Br. Pet. Stage 9-13), does the relevant language in the treaties and statutes protecting the use and occupancy of the reservations in *Moe*, *Colville* and *Potawatomi* appear to afford those Tribes less protection

than is afforded the New York Tribes.[14] Accordingly, the three early treaties with the Six Nations do not suggest that the principles applicable to state taxing and other jurisdiction over non-Indians on reservations in New York differ from those applicable on reservations elsewhere in the United States. Compare *New York ex rel. Ray* v. *Martin*, 326 U.S. 496, 500-501 (1946) (the rule of *United States* v. *McBratney*, 104 U.S. 621 (1881), under which a State has jurisdiction over a crime committed by one non-Indian against another on a reservation, applies in New York, notwithstanding the Treaty of Canandaigua).

Article 9 of the Treaty of Buffalo Creek (1842), 7 Stat. 590 (see Tribes' Amici Br. Pet. Stage 8-9, 10-13)), likewise does not have a preemptive force that is broader for present purposes than that of the western treaties. Article 9 provides that such "lands" as may remain in the possesion of the Senecas are protected "from all taxes, and assessments for roads, highways, or any other purpose." As the Appellate Division observed in *Snyder* v. *Wetzler*,

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[14] Amici Tribes assert (Br. Pet. Stage 9) that a distinction is warranted because the western Tribes were "defeated in battle" and forced to relinquish title to their lands. There are numerous difficulties with that asserted distinction. First, as was recognized in the Treaty of Fort Stanwix, most of the Six Nations of the Iroquois in New York were aligned during the Revolutionary War with the British, who were "defeated in battle." See *Oneida II*, 470 U.S. at 231. Second, not all of the Tribes in the western part of the country were defeated in battle with the United States, and some obtained fee simple title as absolute as that of the Six Nations. See, *e.g.*, *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970). Third, even without the sort of explicit recognition of title that the Senecas obtained in Article III of the Treaty of Canandaigua, the western Tribes that entered into treaties with the United States obtained well-recognized rights in their reservations that would appear to be as strong as those of the New York Tribes. See *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476, 497-498 (1937); *Felix S. Cohen's Handbook of Federal Indian Law* 472 (1982 ed.) (describing various sources of Indian title). Fourth, it is not evident why Congress would have intended the nature of a Tribe's property rights to affect the extent to which a State could apply its tax laws to non-Indians on reservation lands.

1993 WL 463277, at *1-*2, that language is limited to taxes assessed against the land itself. It does not, on its face, address the distinct question of the extent to which the State may assess its sales tax against non-Indians who engage in transactions with Indians on those lands.[15] See *Yakima*, 112 S. Ct. at 692-693 (distinguishing taxes on land from other taxes). The validity of other state taxes imposed on Indians and non-Indians therefore should instead be resolved under the general preemption principles this Court has developed. In any event, whatever the preemptive force of the Treaty of Buffalo Creek in other contexts, there is no reason to believe that it is any greater in the present setting than that of the Indian Trader Statutes.

II. THE NEW YORK CIGARETTE TAX SCHEME IS NEVERTHELESS INVALID AS APPLIED TO RESPONDENTS BECAUSE IT DIRECTLY REGULATES AND SUBSTANTIALLY BURDENS THE DISTRIBUTION AND SALE OF CIGARETTES TO INDIANS

For the reasons stated in Point I, *Moe* and its progeny permit—and the Indian Trader Statutes do not forbid—a State to tax the sale of cigarettes by an Indian retailer to non-Indians, and to impose on retailers and Indian Trader wholesalers the minimum burdens of prepaying the tax and maintaining records of taxable and tax-exempt sales. But the regulations issued by the New York Department of Taxation and Finance go much further. They pervasively regulate commerce in cigarettes among wholesalers,

[15] The Tribes also rely (Br. Pet. Stage 14-17) on *The New York Indians*, 72 U.S. (5 Wall.) 761, 766-771 (1867). That case, however, invalidated state taxes assessed on reservation lands owned by the Indians. It did not speak to the validity of taxes imposed on non-Indians. Moreover, the *The New York Indians* did not state a rule unique to the New York Tribes; rather, the Court applied (see *id.* at 769-770) the general principles it had announced earlier the same Term in *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867). See also *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 764-765 (1985).

reservation retailers, Tribes and tribal members. The judgment of the New York Court of Appeals invalidating the regulations therefore should be affirmed.

The Constitution expressly confers on Congress the power to regulate "Commerce * * * with the Indian Tribes." Art. 1, § 8, Cl. 3. That provision was intended to vest exclusive control in the national government over commerce with the Indians, and thereby to eliminate the difficulties that had arisen as a result of competing assertions of authority by Congress and the States under the ambiguous terms of Article IX of the Articles of Confederation. See *Oneida II*, 470 U.S. at 234 n.4; *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 18-19 (1831); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 558-559 (1832); *The Federalist* No. 42, at 284 (J. Madison) (J. Cooke ed. 1961).

Congress enacted the Indian Trader Statutes pursuant to its exclusive power under the Indian Commerce Clause. The first version was passed in 1790 (see Act of July 22, 1790, ch. 33, 1 Stat. 137), and such statutes have been carried forward to the present day to prevent "fraud and imposition" on the Indians. See *Central Machinery*, 448 U.S. at 163 (quoting H.R. Rep. No. 474, 23d Cong., 1st Sess. 11 (1834)). Consistent with the origins of Congress's power over Indian Commerce, this Court has held that, by enacting the Indian Trader Statutes, Congress "has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject." *Central Machinery*, 448 U.S. at 166 (quoting *Warren Trading Post*, 380 U.S. at 691 n.18).

The Indian Trader Statutes place in the Commissioner of Indian Affairs the "sole power and authority" to appoint Indian Traders and "to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. 261. The Commissioner in turn has promulgated "detailed regulations." *Warren Trading Post*, 380 U.S. at 689; see 25 C.F.R. Pt. 140. The

Statutes and regulations govern qualifications for traders (25 C.F.R. 140.9), the inspection of records to ensure "fair and reasonable" prices (25 C.F.R. 140.22), trading by government employees (25 C.F.R. 140.5), places where trade may be conducted (25 C.F.R. 140.14), the sale of tobacco and alcohol (25 C.F.R. 140.17, 140.18), prohibitions against gambling, the sale of drugs, and trade in antiquities and infectious plants (25 C.F.R. 140.19, 140.21, 140.25, 140.26), credit (25 C.F.R. 140.23), payments to Indians (25 C.F.R 120.24), and penalties for violations (25 U.S.C. 264; 25 C.F.R. 140.3). These "apparently all-inclusive regulations," together with the statutes authorizing them, are "in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." *Central Machinery*, 448 U.S. at 163-164 (quoting *Warren Trading Post*, 380 U.S. at 690).

The New York cigarette tax regulations conflict with the foregoing principles in a number of respects. First, the requirement that a retailer obtain a certificate of registration from the State in order to purchase tax-exempt cigarettes from a wholesaler and sell those cigarettes to tribal members is flatly inconsistent with Congress's specification that the Commissioner of Indian Affairs shall have the "sole power and authority" to appoint Indian Traders (25 U.S.C. 261), and that any person desiring to trade with the Indians who establishes "to the satisfaction of the Commissioner of Indian Affairs" that he is a "proper person" may be permitted to do so under such rules and regulations as the Commissioner may prescribe (25 U.S.C. 262; 25 C.F.R. 140.1).[16] The federal statutory

[16] A license applicant must furnish personally identifying information and information about the business, its location, the capital to be invested, the names of employees, and the business experience of the applicant. 25 C.F.R. 140.9(a). In addition, the applicant must submit two testimonials about his character, the character of his employees "and their fitness to be in the Indian country." *Ibid.* Special provisions are made for issuance of licenses for "[i]tinerant peddlers or purveyors of foodstuffs and other merchandise." 25 C.F.R. 140.9(b). At the time of a proposed license renewal, "the superintendent must report as to the record the applicant has made as a trader and his fitness to continue as such under a new license." 25 C.F.R. 140.12.

scheme leaves no room for the additional licensing requirement imposed by New York pursuant to 25 NYCRR 335.6(f)(1), under which the trader must establish to the satisfaction of the New York Department of Taxation and Finance that it meets additional eligibility standards.[17]

Indeed, as applied to reservation retailers who are Indians, the state registration requirement is invalid on independent grounds. In *Moe*, the district court held that a state licensing requirement for cigarette vendors could not be applied to Indian retailers on the reservation under the principles of *McClanahan* that bar the application of state regulatory law to reservation Indians, 392 F. Supp. at 1300, 1307, 1317; 74-1656 J.S. App. 91 (district court judgment), and this Court affirmed that judgment, 425 U.S. at 480-481, 483.[18] By contrast, in *Rice* v. *Rehner*, 463 U.S. 713 (1983), the Court sustained a requirement that a reservation Indian retailer obtain a state license in order to sell liquor only because it concluded that Congress had authorized application of the licensing requirement when it enacted 18 U.S.C. 1161. See 463 U.S. at 725-735; see also *id.* at 734 n.18 (relying on authorization in 18 U.S.C. 1161

[17] Significantly, in *Worcester* v. *Georgia*, the seminal decision in this Court's Indian jurisprudence, the Court invalidated a state licensing requirement for a non-Indian whose activities in Indian territory were authorized under federal law. 31 U.S. (6 Pet.) at 528-529, 542, 561-562.

[18] At page 480 of the opinion, the Court stated that application of the "vendor license fee" conflicted with *McClanahan*. However, as explained in the text, the judgment of the district court that this Court affirmed barred application of any licensing requirement, not just the fee. The Court's reference to the "vendor license fee" therefore presumably was intended to embrace the licensing requirement in its entirety.

in rejecting argument that state licensing requirement was inapplicable under *Warren Trading Post* because the Indian retailer was a licensed Indian Trader).[19]

In addition, the Indian Trader Statutes preempt the provisions of the New York cigarette tax regulations and implementing measures (see Pet. Br. 12-13) that institute a complex scheme of state regulation of the distribution of tax-exempt cigarettes by (1) establishing state-determined quotas of tax-exempt sales on each reservation, (2) allocating each reservation's overall quota among its retail outlets based on a determination by the Department of Taxation and Finance of the "probable demand" for cigarettes by individual Indians within what the Department finds to be the "trade territory" for each outlet, (3) enforcing the allocation scheme through a system of coupons issued to retailers entitling them to purchase a specified amount of tax-exempt cigarettes from wholesalers, and (4) requiring a wholesaler to obtain the prior approval of the Department for each sale and delivery of a specified quantity of tax-exempt cigarettes to a retailer. See 20 NYCRR 335.7(c) and (d). These provisions conflict with the Indian Trader Statutes' vesting in the Commissioner of Indian Affairs of the "sole power and authority * * * to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods * * * [to] be sold to the Indians." 25 U.S.C. 261. "[N]o room

[19] In a related vein, the requirement that an Indian Tribe hold a lawful certificate of tax exemption from the State in order to purchase tax-exempt cigarettes (see 20 NYCRR 335.6(d)(1)(i)) is inconsistent with *McClanahan* and principles of tribal sovereignty. Cf. *Hancock* v. *Train*, 426 U.S. 167 (1976). Similarly, in the absence of an agreement between the State and the Tribe authorizing the State to assist in enforcing tribal law, the requirement in the New York cigarette tax regulations that a reservation retailer establish that it is in compliance with *tribal* law in order to obtain a *state* permit (see 20 NYCRR 335.6(f)(1)(iii)) impinges upon tribal sovereignty. The measures that should be taken to enforce tribal law, and the consequences for failure to comply, are, in the first instance, matters for the Tribe to decide. See *Williams* v. *Lee*, 358 U.S. 217, 220 (1959).

remains for state laws imposing additional burdens upon traders." *Warren Trading Post*, 380 U.S. at 690.[20]

These measures would also greatly burden Indian commerce as a practical matter. An Indian retailer has no guarantee of a designated "trade territory" commensurate with its market share. Although the regulations indicate that information provided by retailers and Tribes would be considered by the state regulators, 20 NYCRR 335.7(d)(3)(i) and (4), there are no standards for doing so.[21] Such state control would also chill efforts by retailers to expand their market shares, interfere with free competition among retailers on the same reservation, and supplant bargaining between retailers and wholesalers over quantity and price, especially to the extent prices are determined by volume of sales or size of shipment. The requirement that the State approve each sale or delivery in advance would undermine the competitive process for similar reasons.[22] And the allocation system would impermissibly burden individual

[20] The Indian Trader Statutes also preempt the regulations' requirement that a retailer take delivery of unstamped cigarettes on the reservation in order to be permitted to make tax-exempt retail sales to individual Indians. See 20 NYCRR 335.6(f)(3)(ii).

[21] The regulations provide for the Department to consider input from the Tribe on the issues of "probable demand" and "trade territory" for reservation outlets only if the Tribe regulates the distribution and sale of cigarettes on its reservation. This limitation fails to respect the sovereign status of a Tribe that, in the exercise of its inherent powers, has elected to leave the distribution of cigarettes unregulated.

[22] The requirement that the Department approve each sale and delivery in advance does not apply where the Tribe concerned enters into an agreement with the Department for the regulation of the sale and distribution of an "agreed upon amount" of tax-exempt cigarettes on the reservation. 20 NYCRR 335.7(c)(1). If the Tribe does not enter into such an agreement (and no New York Tribe has done so), its regulatory authority is subordinated to that of the State. Moreover, even if the Tribe enters into such an agreement, the regulations require a wholesaler to obtain the prior approval of the Tribe before making any sale or delivery on the reservation (*ibid.*), whether or not the Tribe, in the exercise of its sovereign power, would choose to adopt a prior approval requirement. These regulatory provisions are inconsistent with principles of tribal sovereignty.

Indian consumers by restricting the locations at which they are able to purchase tax-exempt cigarettes.[23]

By placing significant restrictions on transactions between retailers and Indian purchasers of cigarettes that are exempt from taxation as a matter of federal law, the New York regulations place direct burdens on "commerce that would exist on the reservations without respect to the tax exemption." *Colville*, 447 U.S. at 157. Moreover, by erecting a special regulatory scheme governing only the distribution and sale of cigarettes to Indians, the State unduly discriminates against Indian commerce. The regulations therefore are invalid under the Indian Commerce Clause, *Colville*, 447 U.S. at 157, as well as under the Indian Trader Statutes and the principles of *McClanahan*.

[23] The regulations also significantly burden individual Indian consumers and Indian commerce by permitting retail sales only to Indians who purchase the untaxed cigarettes for their own use or consumption on the reservation. 20 NYCRR 335.6(b)(1)(ii). Tribal members may not give the cigarettes away, sell them to another tribal member, or possess them elsewhere in the State, and they are thus restricted in their possession and use of the cigarettes long after the transaction that is the subject of the tax has been completed.

CONCLUSION

The judgment of the Court of Appeals of New York should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. The Indian Trader Statutes, 25 U.S.C. 261 *et seq.*, provide as follows:

§ 261. Power to appoint traders with Indians

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

§ 262. Persons permitted to trade with Indians

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

§ 263. Prohibition of trade by President

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

§ 264. Trading without license; white persons as clerks

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided*, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein: *And provided further*, That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior.

2. 25 C.F.R. Pt. 140 provides as follows:

§ 140.1 Sole power to appoint.

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes. Any person desiring to trade with the Indians on any reservation may, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe.

§ 140.2 Presidential prohibition.

The President is authorized, whenever in his opinion the public interest may require, to prohibit the introduction of goods, or of any particular articles, into the

country belonging to any Indian tribe, and to direct that all licenses to trade with such tribe be revoked, and all applications therefor rejected. No trader shall, so long as such prohibition exists, trade with any Indians of or for said tribe.

§ 140.3 Forfeiture of goods.

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without a license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided*, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokee, Chicasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes: *And provided further*, That no white person shall be employed as a clerk by any Indian trader, except as such trade with said Five Civilized Tribes, unless first authorized so to do by the Commissioner of Indian Affairs.

§ 140.5 Bureau of Indian Affairs employees not to contract or trade with Indians except in certain cases.

(a) Definitions of terms as used in this part:

(1) "Indian" means any member of an Indian tribe recognized as eligible for the services provided by the Bureau of Indian Affairs who is residing on a Federal Indian Reservation, on land held in trust by the United States for Indians, or on land subject to a restriction against alienation imposed by the United States. The term shall also include any such tribe and any Indian owned or controlled organization located on such a reservation or land.

(2) "Bureau" or the "Bureau of Indian Affairs" means the Bureau of Indian Affairs and the Office of the Assistant Secretary for Indian Affairs, both in the Department of the Interior.

(3) "Employee" means an officer, employee, or agent of the Bureau of Indian Affairs.

(4) "Secretary" means the Secretary of the Interior.

(5) "Contract" means any agreement made or under negotiation with any Indian for the purchase, transportation or delivery of goods or supplies.

(6) "Trading" means buying, selling, bartering, renting, leasing, permitting and any other transaction involving the acquisition of property or services.

(7) "Commercial trading" means any trading transaction where an employee engages in the business of buying or selling services or items which he/she is trading.

(b) With the exceptions provided in subsection (b) of section 437 of title 18 U.S. Code, section 437 provides that whoever, being an officer, employee, or agent of the Bureau of Indian Affairs, has (other than as a lawful representative of the United States) any interest, in such officer, employee, or agent's name, or in the name of another person where such officer, employee, or agent benefits or appears to benefit from such interest:

(1) In any contract made or under negotiation with any Indian, for the purchase, transportation or delivery of goods or supplies for any Indian, or

(2) In any purchase or sale of any service or real or personal property (or any interest therein) from or to any Indian, or colludes with any person attempting to obtain any such contract, purchase, or sale, shall be fined not more than $5,000 or imprisoned not more than six months or both, and shall be removed from office, notwithstanding any other provision of law concerning termination from Federal employment.

(c) The further subsections of this section authorize certain employees contracting and trading with Indians as authorized by the exceptions in section 437 of title 18 U.S.

Code. All such contracting and trading is subject to the express provision of section 437 that none of the sales or purchases so authorized may be made if the purpose of any such sale, trade, or purchase is that of commercially selling, reselling, trading, or bartering such property.

(d)(1) Under authority granted by section 437(b)(1) of title 18 U.S. Code, employees of the Bureau of Indian Affairs may with the approval of an authorized officer of the Bureau, as designated in paragraph (d)(2) of this section, purchase from or sell to an Indian any service or any real or personal property, not held in trust by the United States or subject to a restriction against alienation imposed by the United States, or any interest in such property. In addition, employees may purchase from Indians without approval from an authorized officer of the Bureau any non-trust or unrestricted personal property for home use or consumption the value of which property does not exceed $1000. Where the purchase or sale price is less than $1,000, employees may also purchase motor vehicles for their personal use from Indians or sell their personal motor vehicles to Indians without obtaining approval of such purchases or sales from an authorized officer of the Bureau. Approval must be obtained if the purchase or sale price is $1,000 or more.

(2) As used in paragraph (d)(1) of this section an authorized officer of the Bureau of Indian Affairs for employees on reservations and in agencies or in field service units shall be the superintendent or other officer in charge of the unit in which the employee is employed. The authorized officer for the superintendent or officer in charge is his or her immediate supervisor. The authorized officer for employees in area offices is the Area Director, and the authorized officer for an Area Director is his or her immediate supervisor. The authorized officer for employees in the Central Office is the Deputy Assistant Secretary—Indian Affairs (Operations).

(e) No employee of the Bureau of Indian Affairs may have any interest in any purchase or sale involving

property or funds which are either held in trust by the United States for Indians or which are purchased, sold, utilized, or received in connection with a contract or grant to an Indian from the Bureau if such employee is employed in the office or installation of the Bureau which recommends, approves, executes, or administers such transaction, grant, or contract on behalf of the United States, except that, as authorized by section 437(b)(1) of title 18 U.S. Code an employee of the Bureau may have such an interest if such purchase or sale is approved by an authorized officer of the Bureau, as designated in paragraphs (e) (3) to (5) of this section, and the conditions in (e) (1) and (2) of this section are satisfied to the extent to which they are applicable to the transaction concerned:

(1) The conveyance or granting of any interest in property held in trust or subject to restriction against alienation imposed by the United States is otherwise authorized by law.

(2) Trading by employees with Indians which involves property or funds which are either held in trust by the United States or are subject to restrictions against alienation imposed by the United States must be conducted on the basis of sealed bid or public auction. If the trading involves leases or sales of trust or restricted Indian land it must be conducted on the basis of sealed bids. Such requirements for sealed bid or public auction may only be waived by the Assistant Secretary for Indian Affairs on the basis of a full report showing:

(i) The need for the transaction,

(ii) The benefits accruing to both parties,

(iii) That the consideration for the proposed transaction shall be not less than the fair market value of the trust or restricted property or interest therein, unless the employee is involved in a transaction in accordance with § 152.25 (c) or (d) or § 162.5(b) (1), (2), or (3) of this title or the employee is the recipient of a benefit for tribal members for which a uniform charge to all members is made, and

(iv) An affidavit as follows shall accompany each proposed transaction: "I (name) (title), swear (or affirm) that I have not exercised any undue influence nor used any special knowledge received by reason of my employment in the Bureau in obtaining the (grantor's, purchaser's, vendor's) consent to the instant transaction."

(3) The authorized officer of the Bureau for employees employed on reservations, in agencies or service units is one who is not a relative by blood or marriage of the employee, and is not employed at the employee's reservation, agency or service unit. That officer must also be employed at not less than one grade level higher than such employee at the Washington, District of Columbia, Central Office or at an Area Office other than that with authority over the employee's reservation, agency, or service unit.

(4) The authorized officer of the Bureau for employees employed in Area offices is one who is not a relative by blood or marriage of the employee, is not employed at the employee's area office, and must be employed at not less than one grade level higher than the employee at the Washington, District of Columbia, Central Office.

(5) The authorized officer of the Bureau for employees employed at the Washington, District of Columbia, Central Office is the Secretary.

(f) Except as provided in subsection (b)(2) of section 437 of title 18 U.S. Code as implemented by this section, nothing in the cited law shall be construed as preventing any employee of the Bureau who is an Indian, of whatever degree of Indian blood, from obtaining or receiving any benefit or benefits made available to Indians generally or to any member of his or her particular tribe, under any Act of Congress, nor to prevent any such employee who is an Indian from being a member of or receiving benefits by reason of his or her membership in any Indian tribe, corporation, or cooperative association organized by Indians, when authorized under such rules and regulations as the Secretary or his/her designee has prescribed or shall prescribe.

§ 140.9 Application for license.

(a) Application for license must be made in writing on Form 5-052, setting forth the full name and residence of the applicant; if a firm, the firm name and the name of each member thereof; the place where it is proposed to carry on the trade; the capital to be invested; the names of the clerks to be employed; and the business experience of the applicant. The application must be forwarded through the Superintendent to the Commissioner of Indian Affairs, accompanied by two satisfactory testimonials on Form 2-077 as to the character of the applicant and his employees and their fitness to be in the Indian country, and by an affidavit of the Superintendent on Form 5-053 that neither he nor any person for him has any interest, direct or indirect, present or prospective, in the proposed business or the profits arising therefrom, and that no arrangement for any benefit to himself or to any other person on his behalf is contemplated in case the license is granted. Licensed traders will be held responsible for the conduct of their employees.

(b) Itinerant peddlers or purveyors of foodstuffs and other merchandise shall be considered as traders and shall obtain a license or permit from the Superintendent setting forth the class of trade or peddling to be carried on, furnishing such character or credit references, or both, as may be required by the Superintendent. The period of the license for such itinerant peddlers shall be determined by the Superintendent.

(c) When a license or permit to trade is issued under the regulations in this part 140, a fee of $5, payable when the license is issued, shall be levied against the licensee.

§ 140.11 License period.

Licenses to trade shall not be issued unless the proposed licensee has a right to the use of the land on which the business is to be conducted. The license period

shall correspond to the period of the lease or permit held by the licensee on restricted Indian land, except that where the proposed licensee is the owner or beneficial owner or holds a use right to the land on which the business is to be conducted, the license period shall be fixed by the Commissioner of Indian Affairs or his authorized representative, but in no case shall the license period exceed 25 years.

§ 140.12 License renewal.

Application for renewal of license must be made to the Commissioner of Indian Affairs on Form 5-054, through the superintendent, at least 30 days prior to the expiration of the existing license, and the superintendent must report as to the record the applicant has made as a trader and his fitness to continue as such under a new license.

§ 140.13 Power to close unlicensed stores.

If persons carry on trade within a reservation with the Indians without a license, or continue to trade after expiration of the license without applying for renewal, the superintendent will immediately report the facts in the case to the Commissioner of Indian Affairs, who may, if necessary, direct the superintendent to close the stores of such traders.

§ 140.14 Trade limited to specified premises.

No trade with Indians is permitted at any other place than that specified in the license. Licenses to [*sic*] not cover branch stores. A separate license and bond must be furnished for each such store. The business of a licensed trader must be managed by the bonded principal, who must habitually reside upon the reservation, and not by an unbonded subordinate.

§ 140.15 License applicable for trading only by original licensee.

No trader will be allowed to lease, sublet, rent, or sell any of the buildings which he occupies, for any purpose to any other person or concern, without the approval of the Commissioner of Indian Affairs. A license to trade with Indians does not confer upon the trader any right or privileges in respect to the herding or raising of livestock upon the reservation. The use of reservation lands, whether tribal or allotted, for such purposes can be obtained by a trader only upon the terms and under the restrictions which apply to other persons. His license gives him no advantage over others in this respect.

§ 140.16 Trade in annuities or gratuities prohibited.

Traders are forbidden to buy, trade for, or have in their possession any annuity or other goods of any description which have been purchased or furnished by the Government for the use or welfare of the Indians. Livestock or their increase purchased by the Government and in possession or control of the Indians may not be purchased by any trader, not a member of the tribe to which the owners or possessors of the cattle belong, except with the written consent of the agent of said tribe.

§ 140.17 Tobacco sales to minors.

No trader shall sell tobacco, cigars, or cigarettes to any Indian under 18 years of age.

§ 140.18 Intoxicating liquors.

No trader shall use or permit to be used his premises for any unlawful conduct or purpose whatsoever. No trader shall use of [*sic*] permit to be used any part of his premises for the manufacture, sale, gift, transportation,

drinking or storage of intoxicating liquors or beverages in violation of existing laws relating thereto. Violation of this section will subject the trader to criminal prosecution, revocation of license and such other action as may be necessary.

§ 140.19 Drugs.

Traders shall not keep for sale, or sell, give away, or use any opium, chloral, cocaine, peyote or mescal bean, hashish or Indian hemp or marihuana, or any compound containing either ingredient, and for violation hereof the trader's license shall be revoked.

§ 140.21 Gambling.

Gambling, by dice, cards, or in any way whatever, is strictly prohibited in any licensed trader's store or on the premises.

§ 140.22 Inspection of traders' prices.

It is the duty of the superintendent to see that the prices charged by licensed traders are fair and reasonable. To this end the traders shall on request submit to the superintendent or inspecting officials the original invoice, showing cost, together with a statement of transportation charges, retail price of articles sold by them, the amount of Indian accounts carried on their books, the total annual sales, the value of buildings, livestock owned on reservation, the number of employees, and any other business information such officials may desire. The quality of all articles kept on sale must be good and merchantable.

§ 140.23 Credit at trader's risk.

Credit given Indians will be at the trader's own risk, as no assistance will be given by Government officials in the

collection of debts against Indians. Traders shall not accept pawns or pledges of personal property by Indians to obtain credit or loans.

§ 140.24 Cash payments only to Indians.

Traders must not pay Indians in tokens, tickets, store orders, or anything else of that character. Payment must be made in money, or in credit if the Indian is indebted to the trader.

§ 140.25 Trade in antiquities prohibited.

Traders shall not deal in objects of antiquity removed from any historic or prehistoric ruin or monument on land owned or controlled by the United States.

§ 140.26 Infectious plants.

Traders shall not introduce into, sell, or spread within Indian reservations any plant, plant product, seed, or any type of vegetation, which is infested, or infected or which might act as a carrier of any pests of infectious, transmissible, or contagious diseases, as determined by the laws and regulations of the State for plant quarantine and pest control. For the purpose of enforcement of this provision State officers may enter Indian reservations, with the consent of the superintendent, to inspect the premises of such traders and otherwise to execute such State laws and regulations.